Decorative Floors, Inc. *and* Northwest Ohio District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Case 8–CA–25895

September 30, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

Upon a charge filed by the Union October 28, 1993, as amended December 14, 1993, the Acting General Counsel issued a complaint December 16, 1993, an amended complaint April 15, 1994, and an amendment to the amended complaint May 6, 1994, against Decorative Floors, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act.

The complaint alleges, inter alia, that from about June 30 through August 16, 1993, the Respondent failed to remit all fringe benefit contributions that were due under the parties' collective-bargaining agreement which expired June 30, 1993. On December 27, 1993, April 28 and May 6, 1994, the Respondent filed an answer, an answer to the amended complaint, and an amendment to the latter answer, respectively, admitting in part and denying in part the allegations in the complaint.

Thereafter, on March 9, 1994, the Union filed a Motion for Summary Judgment and a supporting memorandum, with exhibits attached. On April 18, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The General Counsel filed a motion joining the Charging Party's motion with a supporting memorandum May 9, 1994. Also, on May 9, the Respondent filed an opposition to the Motion for Summary Judgment. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The parties' submissions disclose that, since about 1986, the Respondent has been signatory on an individual basis to a series of collective-bargaining agreements between various floor covering contractors in northwestern Ohio and the Northwest Ohio District Council of Carpenters. The collective-bargaining agreement that was effective from July 1, 1989, through June 30, 1993 provided in pertinent part at article I that:

> The Employer acknowledges that the Union has offered to establish its majority status by allowing the Employer to examine authorization cards voluntarily executed by the Employer's eligible employees in an appropriate unit; the Employer is satisfied that the Union represents a majority of its eligible employees in an appropriate unit and has waived the opportunity to examine the authorization cards; and, therefore, the Employer recognizes, pursuant to Section 9(A) [sic] of the Labor Management Relations Act of 1947, as amended, the Union as the sole and exclusive bargaining representative of all full-time and regular part-time journeymen, apprentices, trainees, foreman, and general foremen performing floor laying work, but excluding all office employees, professional employees, managerial employees, guards and supervisors as defined in the Labor-Management Relations Act of 1947, as amended.

Article II of the parties' contract required the Respondent to remit fringe benefit contributions to the Ohio Carpenters Health and Welfare Plan, the Ohio Carpenters Pension Plan and Trust, the Carpenters Joint Apprenticeship Funds, the Northwest Ohio District Council of Carpenters Supplemental Pension Plan, and the Northwest District Council of Carpenters Vacation Plan and Trust.

The parties attempted to negotiate a successor agreement during the summer of 1993.[1] When the parties failed to reach an agreement by August 16, the unit employees went on strike. Thereafter, on September 13, the Respondent and the Union executed a memorandum agreement agreeing to be bound by the terms of a new contract which is effective from that date until June 30, 1997. The Union learned the next month that the Respondent had failed to remit fringe benefit contributions due under the expired contract for the period from June 30 through August 16, 1993. The Union then filed the instant unfair labor practice charge.

In its motion, the Union stresses that in *Schmidt-Tiago Construction Co.*, 286 NLRB 342 (1987), the Board found that the employer had violated Section 8(a)(5) and Section 8(d) of the Act by unilaterally discontinuing fringe benefit contributions required under an expired collective-bargaining agreement. The Union claims that in this case there was no bargaining impasse or union agreement to the discontinuance of fringe benefit contributions that would justify the Respondent's failure to make such payments.

While noting the Respondent's argument that the expired contract was an 8(f) agreement and that, therefore, the obligation to make the payments ceased on its expiration, the Union contends, citing *Golden West Electric*, 307 NLRB 1494 (1992), that article I of the agreement establishes the parties' clear intent to create a 9(a) relationship. The Union also notes that in *Casale Industries*, 311 NLRB 951 (1993), the Board held that where, as here, a construction-industry employer recognizes a labor organization under Section

[1] All dates are in 1993 unless otherwise noted.

9(a) and no challenge to that status occurs within the 10(b) limitations period, the Board will not entertain a subsequent claim that majority status was lacking at the time of recognition. Thus, the Union argues that, by virtue of its status as a 9(a) bargaining representative, the Respondent was obligated to continue fringe benefit payments after the contract expired. The Respondent's failure to make them, in the Union's view, clearly violated Section 8(a)(5) and Section 8(d) of the Act.

In joining the Union's motion, the General Counsel also argues that *Golden West Electric*, supra, supports a finding that the parties had a 9(a) bargaining relationship which obligated the Respondent to continue fringe benefit payments. Accordingly, the General Counsel urges the Board to grant the Union's motion and find that the Respondent's conduct was unlawful.

The Respondent has admitted that it discontinued the fringe benefit payments as alleged in the complaint. It argues, however, that the present case is distinguishable from *Golden West Electric* where the union made a specific demand for 9(a) recognition by presenting the employer with a voluntary recognition agreement during the term of an existing collective-bargaining agreement and the employer there admitted having read the document and agreeing that the union possessed majority status. In this case, according to the Respondent, there are none of the extrinsic circumstances on which the Board relied in *Golden West Electric*. The Respondent stresses, while relying on the affidavit of its president, Dan Grant, that the Union never made a demand for recognition and did not provide it with any authorization cards. Thus, the Respondent contends that the Union failed to meet its burden of showing that the parties had a 9(a) relationship. Based on its view that the contract which expired on June 30, 1993, was an 8(f) agreement, the Respondent asserts, citing, inter alia, *Brannan Sand & Gravel Co.*, 289 NLRB 977 (1987), that it lawfully discontinued fringe benefit payments on expiration. Accordingly, the Respondent contends that the Board should deny the Union's Motion for Summary Judgment.

The Board held in *John Deklewa & Sons*, 282 NLRB 1375, 1385 fn. 41 (1987), that the party asserting a 9(a) relationship in the construction industry has the burden of proving the existence of this relationship. Here, article I of the parties' collective-bargaining agreement which expired on June 30, 1993, as quoted above, unequivocally and unambiguously states that ''the Union represents a majority of [the Respondent's] eligible employees in an appropriate unit and . . . pursuant to Section 9(A) [sic] . . . the Union [is] the sole and exclusive bargaining representative.'' Although, as the Respondent has noted, the Board relied on extrinsic evidence, as well as the language of the collective-bargaining agreement, in finding that the union held 9(a) status in *Golden West Electric*, we conclude that in the present case the contractual language, standing alone, is sufficient to establish that such a relationship existed here. We note that the Respondent has not disputed that it voluntarily entered into that collective-bargaining agreement. Thus, we find that the Respondent, by executing an agreement with this provision, has unequivocally conferred 9(a) status on the Union as the exclusive bargaining representative of the unit employees.[2]

Because a 9(a) relationship existed between the parties, the Respondent was obligated to continue making fringe benefit fund payments after the contract expired on June 30, 1993. The Board has held that an employer is obligated to continue fringe benefit contributions after the expiration of a contract barring the existence of an impasse or a valid waiver of such contributions. See *Schmidt-Tiago Construction Co.*, supra. The Respondent has not argued either defense in this case. Accordingly, we grant the Motions for Summary Judgment filed by the General Counsel and the Charging Party. We therefore conclude that the Respondent has acted contrary to Section 8(d) and has violated Section 8(a)(5) and (1) by failing to remit fringe benefit contributions to the Union from about June 30 through August 16, 1993.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Ohio corporation, with an office and place of business in Toledo, Ohio, is engaged in the construction industry as a seller and installer of floor coverings and other related materials. The Respondent, in conducting its business operations, annually derives gross revenues in excess of $500,000 and purchases and receives at its Toledo, Ohio facility products, goods and materials valued in excess of $50,000 directly from points located outside the State of Ohio. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[2] Member Cohen notes that, in any event, the Board's decision in *Casale Industries*, supra, precludes the Respondent from challenging the Union's 9(a) status here inasmuch as more than 6 months elapsed between the time of recognition and the time of the Respondent's unilateral conduct. Member Devaney did not participate in *Casale Industries* and does not rely on the 6-month time limit on construction industry employers' challenges to 9(a) status for the reasons set forth in *Triple A Fire Protection*, 312 NLRB 1088 fn. 3 (1993).

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time journeymen, apprentices, trainees, foremen, and general foremen performing floor laying work, but excluding all office employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

Since about 1986 and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit employees and has been recognized as such by the Respondent. The recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from September 13, 1993, through June 30, 1997. At all times since 1986, based on Section 9(a) of the Act, and by the provisions set forth in its collective-bargaining agreements with the Respondent, the Union has been the exclusive collective-bargaining representative of the unit employees for the purposes of collective bargaining with respect to rates of pay, wages, hours, and other terms and conditions of employment.

From about June 30 through August 16, 1993, the Respondent failed to remit all fringe benefit contributions due under the contract which expired on June 30, 1993, including those contributions due to the Ohio Carpenters Health and Welfare Plan, the Ohio Carpenters Pension Plan and Trust, the Carpenters Joint Apprenticeship Funds, the Northwest Ohio District Council of Carpenters Supplemental Pension Plan, and the Northwest District Council of Carpenters Vacation Plan and Trust. The terms and conditions of the agreement which the Respondent failed to continue in full force and effect relate to wages, hours, and other terms and conditions of employment in the bargaining unit and are mandatory subjects for the purposes of collective bargaining. The Respondent engaged in this conduct without prior notice to the Union and without affording it an opportunity to bargain about such actions. Accordingly, we find that the Respondent, by the acts and conduct set forth above which occurred between June 30, and August 16, 1993, has acted contrary to Section 8(d) and has violated Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By unilaterally ceasing contractually required fringe benefits contributions from about June 30 through August 16, 1993, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(d), Section 8(a)(5) and (1), and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has acted contrary to Section 8(d) and has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall also order that the Respondent make whole the unit employees by paying those contributions to the Ohio Carpenters Health and Welfare Plan, the Ohio Carpenters Pension Plan and Trust, the Carpenters Joint Apprenticeship Funds, the Northwest Ohio District Council of Carpenters Supplemental Plan, and the Northwest District Council of Carpenters Vacation Plan and Trust which have not been paid and which would have been paid in the absence of the Respondent's unlawful unilateral discontinuance of such payments from about June 30 through August 16, 1993.[3] The Respondent also shall reimburse with interest its employees for any expenses resulting from its failure to make contributions to the various funds described above. *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).[4]

ORDER

The National Labor Relations Board orders that the Respondent, Decorative Floors, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist

(a) Unilaterally ceasing payments to the Ohio Carpenters Health and Welfare Plan, the Ohio Carpenters Pension Plan and Trust, the Carpenters Joint Apprenticeship Funds, the Northwest Ohio District Council of Carpenters Supplemental Pension Plan, and the Northwest District Council of Carpenters Vacation Plan and Trust.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Northwest Ohio District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO as the exclusive representative of employees with respect to rates of pay, wages, hours, and other terms and conditions of employment in the following appropriate unit:

> All full-time and regular part-time journeymen, apprentices, trainees, foremen, and general foremen performing floor laying work, but excluding all office employees, professional employees,

[3] We leave to further proceedings the question of any additional amounts the Respondent must pay into the benefit funds to satisfy our make whole remedy here. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

[4] Interest shall be computed pursuant to *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

managerial employees, guards and supervisors as defined in the Act.

(b) Make whole the unit employees by paying contributions to the Ohio Carpenters Health and Welfare Plan, the Ohio Carpenters Pension Plan and Trust, the Carpenters Joint Apprenticeship Funds, the Northwest Ohio District Council of Carpenters Supplemental Pension Plan, and the Northwest District Council of Carpenters Vacation Plan and Trust, which have not been paid and which would have been paid in the absence of the Respondent's unlawful unilateral discontinuance of such payments from about June 30 through August 16, 1993, as set forth in the remedy section of this decision.

(c) Reimburse the unit employees for any expenses, plus interest, they incurred as the result of the Respondent's failure to make the fringe benefit payments described above.

(d) Post at its facility in Toledo, Ohio, copies of the attached marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER STEPHENS, concurring.

I join my colleagues in granting the Motions for Summary Judgment filed by the General Counsel and the Charging Party. Accordingly, I too find that the Respondent violated Section 8(a)(5) and (1) as alleged in the complaint by ceasing to make the specified fund contributions without prior notice to the Union and an opportunity to bargain. In so finding, I rely on the fact that the Respondent's challenge to the allegations of majority status contained in the recognitional clause of the 1989–1993 collective-bargaining agreement which it had signed was untimely, i.e., the challenge was made more than 6 months after execution of the agreement. *Casale Industries*, 311 NLRB 951, 953 (1993).

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally cease payments to the Ohio Carpenters Health and Welfare Plan, the Ohio Carpenters Pension Plan and Trust, the Carpenters Joint Apprenticeship Funds, the Northwest Ohio District Council of Carpenters Supplemental Pension Plan, and the Northwest District Council of Carpenters Vacation Plan and Trust.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with Northwest Ohio District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO as the exclusive representative of employees with respect to rates of pay, wages, hours, and other terms and conditions of employment in the following unit:

All full-time and regular part-time journeymen, apprentices, trainees, foremen, and general foremen performing floor laying work, but excluding all office employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

WE WILL make whole the unit employees by paying contributions to the Ohio Carpenters Health and Welfare Plan, the Ohio Carpenters Pension Plan Trust, the Carpenters Joint Apprenticeship Funds, the Northwest Ohio District Council of Carpenters Supplemental Pension Plan, and the Northwest Ohio District Council of Carpenters Vacation Plan and Trust, which have not been paid and which would have been paid in the absence of the Respondent's unlawful unilateral discontinuance of such payments from about June 30 through August 16, 1993.

WE WILL also reimburse with interest the unit employees for any expenses they incurred as the result of our failure to make the fringe benefit contributions described above.

DECORATIVE FLOORS, INC.